FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALFRED ARNOLD AMELINE, Defendant - Appellant.	No. 02-30326 D.C. No. CR-02-00011-SEH OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted En Banc March 24, 2005
San Francisco, California

Filed June 1, 2005

Before: SCHROEDER, Chief Judge, O'SCANNLAIN, HAWKINS, THOMAS, WARDLAW, W. FLETCHER, FISHER, GOULD, RAWLINSON, CLIFTON, and BEA, Circuit Judges.

Opinion by Judge Rawlinson

RAWLINSON, Circuit Judge:

This case requires us to apply the United States Supreme Court's ruling in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker*, the Supreme Court

struck down the sentencing scheme created by the Sentencing Reform Act of 1984 to the extent that the Act mandated the imposition of sentences predicated on facts not found by the jury or admitted by the defendant. To remedy the constitutional infirmity, the Court severed the mandatory portions of the Act, rendering its sentencing provisions, including the Sentencing Guidelines, effectively advisory. Left unresolved by *Booker* is the question of what relief, if any, is to be afforded to a defendant who did not raise a Sixth Amendment challenge prior to sentencing. We reheard this case *en banc* to address this issue for cases pending on direct review.

We are aware that our opinion is of considerable interest to the judges and practitioners in this Circuit who will face a myriad of issues post-*Booker*. We will not endeavor to foresee or address all potential ramifications of the *Booker* decision. However, we think it appropriate to amplify the context within which we decide this case in the hope of facilitating the resolution of pending cases.

We are, of course, not the only court of appeals to confront this issue. Our colleagues across the country have also wrestled with the aftermath of *Booker*. The difficulty of the matter is demonstrated by the fact that the various circuits have taken divergent approaches. We appreciate and have benefitted from their discussions in arriving at our own conclusion.

As described in more detail below, we hold that when we are faced with an unpreserved *Booker* error that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory. If the district court responds affirmatively, the error was prejudicial and failure to notice the error would seriously affect the integrity, fairness and public reputation of the proceedings. The original sentence will be vacated by the district court, and the district court will resentence the defendant. If the district court responds in the negative, the original sentence will stand, subject to appellate review for reasonableness. *See Booker,* 125 S. Ct. at 769. In essence, we elect to follow the approach adopted by the Second Circuit in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

I.

Factual Background

Defendant Alfred Ameline pled guilty to knowingly conspiring to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The plea agreement approved by the court did not specify the quantity of methamphetamine

involved, although at his change of plea hearing Ameline admitted that "some methamphetamine" was involved in the charged conduct. Ameline disputed the government's assertion that the amount of methamphetamine attributable to him was one and one-half kilograms.

The Presentence Report (PSR) prepared by the Probation Office attributed 1,079.3 grams of methamphetamine to Ameline. That amount resulted in a base offense level of 32, after applying the drug equivalency table from the United States Sentencing Guidelines Manual (Guidelines) § 2D1.1(c). The probation officer's conclusion as to drug quantities was based solely on the investigative reports the officer had reviewed, and the PSR contained a summary of the salient portions of the reports. A two-level enhancement was recommended pursuant to § 2D1.1(b)(1) for possession of a firearm in connection with the charged offense, resulting in an adjusted offense level of 34. With the recommended three-level adjustment for acceptance of responsibility, the recommended total offense level was 31. With a criminal history category of I, the sentencing range recommended in the PSR was 108 months to 135 months.

Ameline filed objections to the PSR, challenging the amount of drugs attributed to him. He also denied the truth of the firearm allegations. However, he did not challenge the recommended drug quantity enhancement as violative of the

Sixth Amendment. The probation officer dismissed Ameline's objections and reaffirmed his determination of the quantity of methamphetamine in the original PSR and his recommendation as to the weapons enhancement. Ameline objected to the final PSR finding in his sentencing memorandum to the court.

At the beginning of the sentencing hearing, before any witnesses were called, the district judge informed the parties how he intended to proceed:

> It is the position of this court in this matter, as it is in all such cases, that the facts as recited in the presentence report are prima facie evidence of the facts set out there; that if the defendant challenges the facts set forth in the presentence report, it is the burden of the defendant to show that the facts contained in the report are either untruthful, inaccurate, or otherwise unreliable.

The district judge then asked defense counsel to call his first witness. However, before counsel called any witnesses, the court again reiterated its intention:

> [I]t is my position that the statements in the presentence report, that is, statements of fact, are reliable on their face and prima facie evidence of the facts there stated. And I will be taking those into account to the extent relevant to the obligations that I have in fashioning sentence and fixing responsibility for drug quantities, if they are not overcome by other evidence presented at this hearing. Be guided accordingly.

Consistent with his objections, Ameline testified and presented witnesses to refute the drug amounts attributed to him in the PSR. The government contended

that an even larger amount of drugs should be attributed to Ameline, based on transactions not included in the PSR recommendation. No specific testimony was directed toward the firearm enhancement.

At the conclusion of the sentencing hearing, the district court found that 1,603.60 grams of methamphetamine were attributable to Ameline. That finding resulted in a base offense level of 34, two levels higher than that recommended in the PSR. The PSR described two additional transactions, but the probation officer did not include those transactions in calculating the recommended drug amount. The district court, however, included the amounts involved in the described transactions, thus establishing a higher base offense level. The district court stated:

> I should let all parties know that all findings are based upon a preponderance of the evidence standard and are established at least to that standard in the view of the court.

The district court found the § 2D1.1(b)(1) weapons enhancement "undisputed," and applied a two-level enhancement for an offense level of 36, but deducted three points for timely acceptance of responsibility, for a total offense level of 33. The district court sentenced Ameline to 150 months, in the middle of the 135 to 168-month Guidelines range.

Ameline appealed. In his opening brief, Ameline challenged the district court's allocation of the burden of proof and the reliability of the hearsay evidence

used to prove drug quantity. Ameline did not initially contest the preponderance of the evidence standard employed by the district court or the propriety of judicial factfinding under a mandatory sentencing regime.

After the case was submitted for decision by a three-judge panel of our court, but before a decision was filed, the Supreme Court announced its decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In light of *Blakely*, our panel held that the determination of material sentencing facts by the district judge under a preponderance of the evidence standard, rather than by a jury as part of its verdict, violated Ameline's Sixth Amendment rights and amounted to reversible plain error. *United States v. Ameline [Ameline I]*, 376 F.3d 967, 980 (9th Cir. 2004). The panel vacated Ameline's sentence and remanded with instructions that, if necessary, a jury must determine the amount of drugs attributable to Ameline and whether he possessed a weapon in connection with the offense. *Id.* at 983.

Within days of the filing of the panel decision in *Ameline I*, the Supreme Court granted certiorari and scheduled oral argument in *Booker* and a related case, *United States v. Fanfan*, 125 S. Ct. 12 (2004). *Booker* and *Fanfan* raised issues regarding the application of *Blakely* to federal sentencing. That led our court to defer further action on this case until after the Supreme Court announced its

decision in those cases.

After the Supreme Court's decision in *Booker* was announced, the panel issued an amended opinion. *United States v. Ameline [Ameline II]*, 400 F.3d 646 (9th Cir. 2005). As before, the panel concluded that the district court had committed reversible plain error because Ameline's sentence "exceeded 'the maximum authorized by the facts established by a plea of guilty or a jury verdict.'" *Id.* at 653 (quoting *Booker*, 125 S. Ct. at 756). The panel vacated the original sentence and remanded for resentencing. *Id.* at 657–58.

We vacated the panel opinion and granted rehearing en banc. *United States v. Ameline*, 401 F.3d 1007 (9th Cir. 2005). Although Ameline did not challenge the constitutionality of the Guidelines in the district court or in his opening brief on appeal, we conclude, as did the three-judge panel, that it is nonetheless appropriate to permit him to raise those issues. *See United States v. Valdez*, 195 F.3d 544, 547 n.3 (9th Cir. 1999).

II.

The *Booker* Decision

Before *Booker*, sentencing judges were bound by the Guidelines. *See* 18 U.S.C. § 3553(b)(1). After conviction, the Guidelines required the sentencing judge to make factual findings about the defendant and the offense and then, based

on the conviction and facts found independently by the court, determine the appropriate sentencing range. Once the correct sentencing range was determined, departure from that range was authorized only for reasons stated in the Guidelines or where

> the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. § 3553(b)(1).

In *Booker,* the Supreme Court held that the Guidelines as constituted violated the Sixth Amendment. *Booker*, 125 S. Ct. at 756. That outcome followed from the conclusion that the Sixth Amendment precludes a judge from enhancing a sentence based on extra-verdict findings (other than the fact of prior conviction) in a mandatory sentencing regime. *Id.* at 748-49. The majority opinion, authored by Justice Stevens, observed that "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* at 750. Therefore, if a particularly prescient sentencing judge, pre-*Booker*, had made and used the same extra-verdict findings under the same mandatory guidelines regime, but made clear that he was

treating the Guidelines as advisory rather than binding, no Sixth Amendment violation would have occurred under *Booker*. *See id.* ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *see also United States v. Coles,* 403 F.3d 764, 768 (D.C. Cir. 2005); *United States v. Paladino,* 401 F.3d 471, 483 (7th Cir. 2005).

A separate majority of the Court remedied the Sixth Amendment infirmity in the federal sentencing scheme by making the Guidelines effectively advisory. The remedial portion of *Booker*, authored by Justice Breyer, agreed that "without this provision—namely the provision that makes 'the relevant sentencing rules mandatory and imposes binding requirements on all sentencing judges'—the statute falls outside the scope" of the Sixth Amendment's jury trial requirement. *Booker*, 125 S. Ct. at 764 (citations and alteration omitted). Rather than engraft a jury trial requirement onto the mandatory sentencing guideline system, the remedial opinion severed from the Reform Act "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure) and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range." *Id.* (citations omitted).

It is crucial for our current purpose to appreciate the distinction drawn by the Supreme Court and by us. Standing alone, judicial consideration of facts and circumstances beyond those found by a jury or admitted by the defendant does not violate the Sixth Amendment right to jury trial. A constitutional infirmity arises only when extra-verdict findings are made in a mandatory guidelines system. This conclusion has been reached by a majority of the appeals courts that have decided Sixth Amendment sentencing issues post-*Booker*. *See United States v. Antonakopoulos,* 399 F.3d 68, 75 (1st Cir. 2005); *United States v. Williams,* 399 F.3d 450, 458 (2d Cir. 2005); *United States v. Mares,* 402 F.3d 511, 518 (5th Cir. 2005); *Paladino,* 401 F.3d at 482-83 (7th Cir.); *United States v. Pirani,* No. 03-2871, 2005 WL 1039976, at *5 (8th Cir. Apr. 29, 2005) (en banc); *United States v. Lawrence,* No. 02-1259, 2005 WL 906582, at *12 (10th Cir. Apr. 20, 2005); *United States v. Rodriguez,* 398 F.3d 1291, 1300 (11th Cir. 2005); *United States v. Smith,* 401 F.3d 497, 499 (D.C. Cir. 2005) (per curiam).

III.

Application of the Plain Error Standard of Review

As explained, because the Sixth Amendment error was not raised in the district court, to warrant relief the error must constitute plain error. Plain error is "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v.*

Cotton, 535 U.S. 625, 631 (2002) (citation, alteration and internal quotation marks omitted). If these three conditions of the plain error test are met, an appellate court may exercise its discretion to notice a forfeited error that (4) "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citation and alteration omitted).[1]

An error is plain if it is "contrary to the law at the time of appeal . . ." *Johnson v. United States,* 520 U.S. 461, 468 (1997). Ameline's claim of sentencing error meets this requirement, because *Booker* expressly invalidated the federal sentencing guidelines. *See Booker,* 125 S. Ct. at 755-56. The sentencing judge's enhancement of Ameline's sentence in reliance upon judge-made findings under the then-mandatory guidelines, was, therefore, constitutional error. *See id.*

A more vexing inquiry lies in the third prong of the plain error test: whether the error affected Ameline's substantial rights, that is, whether the outcome of Ameline's sentencing was affected by the erroneous enhancement of Ameline's sentence on the basis of judge-made findings in the mandatory guidelines regime.

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[1] A different analysis will apply when a defendant preserves his Sixth Amendment claim by challenging the sentencing guidelines on constitutional grounds before the district court. *See Pirani*, 2005 WL 1039976, at *3-4; *United States v. Fagans*, No. 04-4845, 2005 WL 957187, at *2, (2d Cir. Apr. 27, 2005); *Antonakopoulos*, 399 F. 3d at 76.

Ameline bears the burden of persuading us that his substantial rights were affected. He must establish "that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004) (citations and internal quotation marks omitted). Because the error turns on the use of judge-found facts in a mandatory guidelines system and those guidelines are now advisory, Ameline must demonstrate a reasonable probability that he would have received a different sentence had the district judge known that the sentencing guidelines were advisory.

The difficulty in assessing whether the sentencing error affected Ameline's substantial rights arises because the record does not provide an inkling of how the district court would have proceeded had it known that the Guidelines were advisory rather than mandatory. That is not surprising, since at the time of sentencing, the district court and the parties were operating under the reasonable belief that the Guidelines were mandatory. We surmise that the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory. Although on occasion a district court judge has expressed frustration with the binding nature of the Guidelines, it was very rare for a judge, within the record of

an individual case, to express that view. Pre-*Booker*, there simply would have been no need or practical reason for the judge to make such a record, since the judge could not have expected then that it would make a legal difference.

We conclude that the best way to deal with this unusual situation is to follow the approach adopted by our colleagues on the Second, Seventh, and D.C. Circuits[2] and ask the person who knows the answer, the sentencing judge.[3] Rather than affirm a sentence that was unconstitutional and may have been prejudicial, we elect to remand to the district court to answer the question whether the sentence would have been different had the court known that the Guidelines were advisory. This is "[t]he only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether" there was prejudice.

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[2] *Crosby*, 397 F.3d at 120 (2d Cir.); *Paladino*, 401 F.3d at 483-84 (7th Cir.); *Coles*, 403 F.3d at 769-71 (D.C. Cir.). The Fifth Circuit has also expressed openness to this approach. *See United States v. Pennell*, No. 03-50926, 2005 WL 1030123, at *6 (5th Cir. May 4, 2005).

[3] The district court judge who imposed the sentence in this case is still a sitting federal judge. We recognize that in some cases the original sentencing judge may no longer be available, due to death, disability or retirement, but the number of such cases should be very low. The sentencing judge's unavailability will not necessarily result in an inability to proceed. The record may reflect an admission that was undiscovered in the appellate process. There may be a negotiated sentence. The defendant may even elect not to challenge his sentence on remand. Because the situation of an unavailable judge is not before us, we leave that issue for resolution in a case that presents that issue.

Paladino, 401 F.3d at 483. If the district court responds affirmatively, the error undermines our confidence in the outcome. *See id.* at 484. On the other hand, if the district court responds in the negative and explains why on the record, the original sentence will stand, provided it is reasonable. *See id.*; *cf. Booker*, 125 S. Ct. at 769 (holding that both the Sixth Amendment ruling and the remedial interpretation of the Reform Act, including the reasonableness standard, apply to all cases pending on direct review). The remand contemplated under *Crosby* is a limited one designed to permit the sentencing judge to inform the reviewing court's analysis of whether the sentencing judge "would have imposed a materially different sentence" had he been aware of the now-advisory nature of the sentencing guidelines. *Crosby,* 397 F.3d at 117.

In *Crosby,* the Second Circuit relied on 18 U.S.C. § 3742(f) to support its approach that a third choice is available for election by an appellate court assessing error. *Id.* That subsection provides in pertinent part:

> If the court of appeals determines that–
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> (1) the sentence was imposed in violation of law . . . the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate . . .

18 U.S.C. § 3742(f)(1).

The Second Circuit reasoned that the power to remand for resentencing necessarily encompasses the lesser power to order a limited remand. *Crosby,* 397 F.3d at 117. This is consistent with our case law. As we recently explained in *United States v. Gunning,* 401 F.3d 1145 (9th Cir. 2005), appellate courts are not precluded from limiting the scope of issues on remand, or the district court's consideration of evidence and arguments. *Id.* at 1148.

The Second Circuit viewed the limited remand as a solution to the dilemma facing appellate courts post-*Booker*: in the overwhelming majority of cases, we simply do not know whether the sentencing judge would have imposed the same sentence had he known that the sentencing guidelines were advisory, rather than mandatory. As an alternative to presuming prejudice, presuming non-prejudice, venturing to assess prejudice on a case-by-case basis or engaging in wholesale remands in cases where the record is not sufficiently developed to inform the appellate court's plain error analysis, the Second Circuit elected to remand to the district court. *See United States v. Gonzalez*, No. 04-1956, 2005 WL 1023059, at *3 (2d Cir. May 3, 2005) (citing *Crosby*, 397 F.3d at 117).

We recognize that the Seventh and D.C. Circuits, while endorsing limited remands in *Booker* cases, have adopted a slightly different procedure from that in *Crosby*. Under the Second Circuit approach, if a district court judge determines

that resentencing is warranted after remand from the court of appeals, he or she can simply vacate the sentence and resentence. *Crosby*, 397 F.3d at 120. The Seventh and D.C. Circuits, on the other hand, retain jurisdiction through the limited remand process, thus requiring the district court to indicate that it would have sentenced differently, the court of appeals to vacate the sentence, and finally, the court of appeals to remand to the district court for resentencing. *Paladino*, 401 F.3d at 484; *Coles*, 2005 WL 783069 at *7. The two procedures are very similar, but the *Crosby* procedure is less cumbersome. *See Paladino*, 401 F.3d at 484 ("Our procedure is not identical to that set forth in *Crosby*, though it is very close."); *Coles*, 2005 WL 783069 at *7 (D.C. Cir. Apr. 8, 2005) ("We note that the 'limited remand' procedures adopted by the Second and Seventh Circuits offer slightly different approaches."). *Booker* itself does not require the appellate court to undertake the additional step of vacating and remanding if the district court indicates that it wishes to resentence. Therefore, to facilitate the expeditious handling of *Booker* cases, we follow the Second Circuit in not retaining jurisdiction throughout the limited remand.

We acknowledge that this limited remand approach has not been adopted by all courts to face the post-*Booker* problem. Some circuits have held that when the reviewing court cannot determine whether the Sixth Amendment error was

prejudicial, the defendant has not carried his burden and relief must be denied. *See Antonakopoulos*, 399 F.3d at 80 (1st Cir.); *Mares*, 402 F.3d at 521-22 (5th Cir.); *Pirani*, 2005 WL 1039976, at *6-7 (8th Cir.); *Rodriguez*, 398 F.3d at 1301 (11th Cir.). We do not quarrel with this position as a matter of doctrine; that is the way plain error review normally works.

As we indicated above, however, assigning such a burden to a defendant in this context requires him to demonstrate a sufficient probability that the district court would have imposed a different sentence under an advisory system, even though there would have been no reason for the sentencing court to so indicate. The sentencing court presumably knows the answer to the relevant question and would likely have made a record had it known at the time of sentencing that it would make a difference. Resolving unpreserved sentencing error through a limited remand is comparably easy and yields a result that is certain. *See Williams*, 399 F.3d at 457-59. If we decline to find out what the district court knows unless the defendant can make a showing of something over which he had no control, the defendant will surely feel abused, with some justification, and everyone will be left to wonder about whether the sentencing court might have acted differently. It seems to us that would itself undermine the fairness, integrity

and public reputation of the judicial proceedings, something which we should try to avoid.[4]

Other circuits have, like our own decision in *Ameline II*, taken another approach. Notably, some have held that "where a defendant's sentence was enhanced based on facts neither admitted to nor found by a jury, . . . the defendant can demonstrate plain error and may be entitled to resentencing." *Davis*, 2005 WL 976941, at *1 (3d Cir.); *Hughes*, 401 F.3d at 548-49 (4th Cir.); *Oliver*, 397 F.3d at 379-80 (6th Cir.). Following that reasoning, prejudice is determined by comparing the sentence that the defendant could have received based solely on the jury's verdict (or on facts otherwise admitted by defendant) with the sentence that he actually received. If the former sentence would have been more favorable to the defendant, the defendant was prejudiced. *See, e.g., Hughes*, 401 F.3d at 548-49. As discussed above, however, we view judicial factfinding as erroneous only when coupled with a mandatory guidelines system. Moreover, upon remand the district court will consult the guidelines as required by *Booker* and will be free to

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[4] We do not imply that all forfeited sentencing errors should be addressed by limited remand. *Booker* presents a unique situation. After *Booker*, we are left with hundreds of unconstitutional sentences pending on direct review, and we should not consign the vast majority of these defendants to serve illegal terms when we have an accurate way to resolve the plain error question. We need not speculate about the effect of the error; we can simply ask the sentencing judge.

impose exactly the same sentence. "[I]f the judge would have imposed the same sentence even if he had thought the guidelines merely advisory . . . and the sentence would be lawful under the post-*Booker* regime, there is no prejudice to the defendant." *Paladino*, 401 F.3d at 483; *accord Williams*, 399 F.3d at 459; *Antonakopoulos*, 399 F.3d at 80-81. On balance, therefore, we conclude that the limited remand approach is preferable. As described by Judge Posner, it is

> the middle way between placing on the defendant the impossible burden of proving that the sentencing judge would have imposed a different sentence had the judge not thought the guidelines were mandatory and requiring that all defendants whose cases were pending when *Booker* was decided are entitled to be resentenced, even when it is clear that the judge would impose the same sentence and the court of appeals would affirm.

Paladino, 401 F.3d at 484-85.

We come at last to the fourth prong of plain error review. Here we examine whether a plain and demonstrably prejudicial error "seriously affects the fairness, integrity, or public reputation of [the] judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (citation and alteration omitted). This inquiry hinges on the question presented to the district court. If the district court would have imposed a different sentence in an advisory regime, we "exercise [our] discretion to notice [the] forfeited error," *id.*, because "it is a miscarriage of justice to give a person an illegal sentence, just as it is to convict an innocent person,"

Paladino, 401 F.3d at 483. The original sentence will be vacated, and the district court, with the defendant present, will resentence in accordance with the Reform Act as modified by *Booker*. *See Crosby*, 397 F.3d at 120.

Our colleagues in dissent criticize our adoption of the approach articulated in *Crosby*, characterizing the limited remand procedure as contradicting *Booker,* abdicating our obligation to conduct appellate review, subsuming an inaccurate prejudice inquiry, disregarding district court judges who have left the bench, embracing illusory efficiencies, and encouraging cursory review. *See e.g.*,Wardlaw Concurring/Dissenting Opinion, p. 3; Gould Concurring/Dissenting Opinion, pp. 3, 15, 22-23. Despite our colleagues' thoughtful presentation of their views, we remain convinced that the limited remand procedure set forth in *Crosby* best resolves this unique issue that has arisen in the wake of the Supreme Court's holding in *Booker*.

Unfortunately, we cannot look to *Booker* for guidance in assessing plain error, because *Booker* did not address plain error in the context of resolving the issues in that case. *See Antonakopoulos,* 399 F.3d at 79 n.10 (noting that no plain error issue was before the Court in *Booker*). Although it is true that the Supreme Court did not approve a limited remand procedure, neither did it prohibit one. Similarly, we cannot conclude from the fact that Booker's case was remanded for

resentencing that remand for resentencing is appropriate in all cases. The Supreme Court expressly instructed otherwise. *See Booker,* 125 S. Ct. at 769 ("Nor do we believe that every appeal will lead to a new sentencing hearing."). The fact remains that different approaches have been taken by courts post-*Booker*. We remain of the view that the *Crosby* approach is consistent with *Booker*.

Nor do we agree that the limited remand procedure abdicates our obligation to conduct appellate review. To the contrary, the procedure provides for more accurate appellate review. Without the benefit of the district court's views, we would be left with review of a potentially misleading record. District court judges often make remarks at sentencing for purposes other than fact-finding. A district court judge may choose to say some encouraging words for the benefit of the defendant's family; a district court judge may decide to lecture the defendant with a warning. District court judges have also been known to make stray comments about the Guidelines during sentencing, without necessarily intending for them to be interpreted as meaning that a different sentence would have been imposed under a discretionary sentencing scheme. It would be a mistake for us to attribute fresh meaning to comments made in an entirely different context. It would also be a mistake to infer from a district court's silence that the district court would not have made a different decision under a different sentencing scheme. In sum, in

this unusual context, our ability to assess plain error based on the cold record is significantly impaired. Although no system is perfect, our appellate plain error review will be better informed and more accurate by obtaining the district court's findings. Because a vacation of the sentence would be required if the district court would have imposed a different sentence under a discretionary sentencing system, it is also appropriate for us to direct the district court to proceed with resentencing if the *Booker* error prejudiced the defendant. Identifying legal error and providing direction to the district court on how to cure it is a quintessentially appellate function. Adopting a limited remand procedure to effectuate resolution of legal error does not abdicate our appellate responsibility in the least. Indeed, it is entirely consistent with our usual procedures in such circumstances. *See, e.g., Gunning,* 401 F.3d at 1148 (describing the prior holding in which the panel remanded to ask the district court "to make findings on the record if it had already considered the minor role adjustment, and to resentence if necessary.")"

Further, despite our dissenting colleague's interpretation of the majority opinion as encompassing "every pre-*Booker* defendant asserting plain error," the limited remand is invoked only when it cannot be determined from the record whether the judge would have imposed a materially different sentence had he known that the Guidelines are advisory rather than mandatory. *See Williams,* 399

F.3d at 458-59 (observing that the limited remand procedure is appropriate where the record leaves uncertainty regarding what sentence would have been imposed absent error).[5]

Only after determining that the record did not sufficiently inform the reviewing court's analysis, and only after concluding that the first two prongs of the plain-error test were met did the court in *Crosby* remand the matter to the district court. *See Williams,* 399 F.3d at 460. Rather than being a dereliction, the remand was designed to avoid "leaving in place an error-infected sentence" due to the lack of an adequate record.[6] *See id.* at 461.

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[5] In challenging the Second Circuit's reliance on 18 U.S.C. § 3742 as authority for ordering a limited remand, our colleague cites to dissenting opinions in *Booker*. Those dissents, of course, are not precedential. *See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) (noting that a dissenting Supreme Court opinion is not binding precedent and "does not tell us how a majority of the Court would decide."). The dissent also relies on the *ipse dixit* criticism in *Rodriguez*. However, we are persuaded that the Second Circuit has the better of this argument. *See Crosby,* 397 F.3d at 117 (noting that § 3742(f) provides that an appellate court may remand "with such instructions as the court considers appropriate."). Finally, the language in § 3742 conditioning the power to remand upon a determination that "the sentence was imposed in violation of law" does not undermine the Second Circuit's approach, because any sentence imposed under the mandatory guidelines system with extra-verdict findings was imposed in violation of law. *See Booker,* 125 S. Ct. at 748 (describing such a sentence as violating the Sixth Amendment.).

[6]We acknowledge the existence of cases instructing reviewing courts to

(continued...)

Our dissenting colleague also takes us to task for "asking the wrong question of the district court," and for undertaking "to predict the likely outcome of a remand." However, the limited remand does not seek a response to the question of what the district court would do on remand. Instead, the limited remand seeks a response to the question of whether the district court would have imposed a materially different sentence at the time of sentencing had it known that the Guidelines were advisory rather than mandatory. *See Paladino*, 401 F.3d at 485. This inquiry mirrors the holdings of *Dominguez Benitez,* 124 S. Ct. at 2340, and *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (describing the appropriate inquiry as the effect on the jury's decision, i.e., the outcome).[7]

As noted, we cannot and should not attempt to anticipate and address every issue that may arise in the course of resolving pre-*Booker* sentencing appeals. Many of the "illusory efficiency" scenarios described by our dissenting colleagues are of that nature. Although it is true that a limited remand could result in a

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[6](...continued)
review the "entire record." *See e.g., Dominguez Benitez,* 124 S. Ct. at 2340. We have no quarrel with that directive in principle. However, that principle is of no assistance when review of the "entire record" nevertheless requires resort to rank speculation to complete the plain error analysis.

[7] We note in passing that refraining from adopting the limited remand approach merely because the parties advocated against it is more of an abdication than remanding a matter to the district court to inform the plain error analysis.

subsequent appeal, so could a resentencing. Nevertheless, the relative prospect of future appeals should not deter us from adopting a process that we view as facilitating reliable appellate review. And although efficiency is an important consideration in the administration of justice, *see Government Emp. Ins. Co. v. Dizol*, 133 F.3d 1220, 1226-27 (9th Cir. 1998) (recognizing the importance of judicial economy), it is not the most important consideration in the context of this case. More important is the opportunity under the *Crosby* approach to engage in a more accurately informed plain error review. *See Coles*, 403 F.3d at 770. Indeed, if efficiency were paramount, the procedure of choice would be one that declined to recognize most forfeited *Booker* errors. *See e.g., Rodriguez*, 398 F.3d at 1304 (explaining that "where the record does not provide 'any indication' that there would have been a different sentence," the defendant loses.).

Finally, we do not share the concern regarding cursory review on remand that is articulated in the "dissent from the Seventh Circuit's decision to adopt the same type of limited remand rule." We are confident that our conscientious and able colleagues on the district courts throughout this Circuit will continue to give each case the individualized attention it deserves.

IV.

The Process to be Followed

In hopes of making clear the process that we conclude should be followed, we outline it here. We begin with our own review. *Booker* explicitly stated that its holding applies to all cases pending on direct appeal. *Booker*, 125 S.Ct. at 769. Even where the briefs filed by the parties do not raise a *Booker* objection, we conclude that the issue may be raised and should be considered.

When faced with an unpreserved *Booker/Fanfan* error, the reviewing panel must first determine if an eligible party wants to pursue the subject. Although either the defendant or the government may raise the nonconstitutional error that a sentence was erroneously imposed under guidelines believed to be mandatory, *Booker/Fanfan* 125 S.Ct. at 769, the Sixth Amendment objection – that the defendant's sentence was enhanced by judge-found facts under a mandatory Guidelines system – is available to the defendant alone.[8] However, because we do not assume that every defendant will want to pursue resentencing, the limited remand procedure must include an opportunity for defendants with pending

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[8]In a case where the district court did not treat the sentencing guidelines as advisory but the defendant's sentence was not enhanced by extra-verdict findings —such as where there were no sentencing enhancements or where the defendant acknowledged the facts necessary to justify the enhancement—a different, nonconstitutional error occurs. *See United States v. Castillo*, Nos. 02-3584 & 02-4344, 2005 WL 1023029 (7th Cir. May 3, 2005) (citing cases); *Lawrence*, 2005 WL 906582, at *12. Neither Ameline nor the government has raised the issue of nonconstitutional error in this appeal.

appeals to opt out of resentencing by promptly notifying the district court judge. *See Crosby,* 397 F.3d at 118.

If an eligible party seeks resentencing under *Booker/Fanfan,* we will then engage in the plain error analysis described in this opinion. If that analysis leads the panel to the same dead end that we reach here, where it is not possible to reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we will remand to the sentencing court to answer that question.

In answering the question we pose, the district court need not determine or express what the sentence would have been in an advisory system. It is enough that the sentence would have been materially different. We agree with the Second Circuit that the "views of counsel, at least in writing," should be obtained. *See Crosby,* 397 F.3d at 120.

If the district court judge determines that the sentence imposed would not have differed materially had he been aware that the Guidelines were advisory, the district court judge should place on the record a decision not to resentence, with an appropriate explanation. A party wishing to appeal the order may file a notice of

appeal as provided in Fed. R. App. P. 4(b).[9]

If the district court determines that the sentence imposed would have differed materially if the district court judge were applying the Guidelines as advisory rather than mandatory, the error was prejudicial, and the failure to notice the error would seriously affect the integrity, fairness and public reputation of the proceedings.[10] In such a case, the original sentence will be vacated and the district court will resentence with the defendant present. In resentencing the defendant, the district court is permitted to take a fresh look at the relevant facts and the Guidelines consistent with *Booker*, the Sentencing Reform Act of 1984, Rule 32 of the Federal Rules of Criminal Procedure, and this opinion. *See Gunning,* 401 F.3d at 1148; *see also United States v. Matthews,* 374 F.3d 872, 880 (9th Cir. 2004). In either case, the defendant and the government have the right to appeal to this court the district court's decision, including a challenge to the sentence based on the reasonableness standard established in *Booker*. *Booker,* 125 S. Ct. at 765-66.

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[9]A new appeal taken after the filing of the district court's order will be subject to the usual procedure pertaining to comeback cases, as provided in General Order 3.7, *General Orders of the Ninth Circuit Court of Appeals* (2005).

[10] The parties and the district court may agree in a given case to proceed directly to a resentencing proceeding, without the need for submissions by counsel or separate consideration of the question of whether the previous sentence would have been different had the sentencing court known that the Guidelines were not mandatory.

V.

Erroneous Allocation of the Burden of Proof

The government has conceded that the district court erred in placing the burden of proof on the defendant to disprove the factual basis for the base level offense and sentence enhancements sought by the government. The government "bear[s] the burden of proof for any fact that the sentencing court would find necessary to determine the base offense level." *United States v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990). As we explained in *Howard*, "[s]ince the government is initially invoking the court's power to incarcerate a person, it should bear the burden of proving the facts necessary to establish the base offense level." *Id.* Here, by placing the burden on Ameline to disprove the factual statements made in the PSR, the district court improperly shifted the burden of proof to Ameline and relieved the government of its burden of proof to establish the base offense level.

Of course, the district court may rely on undisputed statements in the PSR at sentencing. *United States v. Charlesworth*, 217 F.3d 1155, 1160 (9th Cir. 2000). However, when a defendant raises objections to the PSR, the district court is obligated to resolve the factual dispute, *see* Fed. R. Crim. P. 32(i)(3)(B), and the government bears the burden of proof to establish the factual predicate for the court's base offense level determination. *Howard*, 894 F.2d at 1090. The court

may not simply rely on the factual statements in the PSR.

The government also bears the burden of proof when it seeks sentence enhancements. *Id.* at 1089. As we explained in *Howard*, the party seeking an adjustment bears the burden of proof. *Id.* Thus, when the defendant requests a downward adjustment, the defendant bears the burden of proof; when the government seeks an upward adjustment, it bears the burden of proof. *Id.* Here, the district court also erred by placing the burden of proof on the defendant to disprove the upward adjustment recommended in the PSR and sought by the government.

The fact that the Sentencing Guidelines have become discretionary following *Booker* does not alter this analysis. The district court's factual findings will determine the base offense level, which remains the starting point for determining the applicable guideline range for an offense under 21 U.S.C. § 841(a)(1). *See* U.S.S.G. § 2D1.1(c). When a defendant contests the factual basis of a PSR, the district court remains obligated to resolve the dispute before exercising its sentencing discretion under *Booker*. In resolving the factual dispute, the district court must continue to apply the appropriate burdens of proof, consistent with *Howard*.

VI.

Conclusion

We adopt the limited remand procedure articulated by the Second Circuit in *Crosby* to assess the existence of plain error in pre-*Booker* sentencing appeals.

In this case, remand is also required to address the district court's error in misallocating the burden of proof at sentencing, in light of the presentation of evidence by Ameline challenging the drug amounts recommended in the PSR. To correct the *Howard* error, the district court must hold a new sentencing hearing in accordance with Federal Rule of Criminal Procedure 32(i). Accordingly, we vacate the sentence and remand for further proceedings consistent with this opinion.

SENTENCE VACATED and REMANDED.

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